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In the Supreme Court of the United States

October Term, 1975

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

On Appeal from the Supreme Court of Wisconsin

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the largest association of business and profes-

[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

sional organizations in the United States, and is the principal spokesman for the American business community. The Chamber of Commerce has a direct membership of over 52,000 business firms and an underlying membership of approximately 5 million individuals and firms.

The Chamber of Commerce has a direct and legitimate interest in the issues raised in the present case. As citizens in virtually every community in this country, our individual and corporate members are vitally interested in all facets of state and local government, including public sector employment relations. Members of the business community are especially concerned with the advancement of sound personnel practices and employee relations which will insure the continued and uninterrupted operation of governmental functions. Additionally, the business community provides through its tax dollars a substantial portion of the funds which support state and local governments and it shares every citizen's deep concern for the prudent expenditure of those tax dollars.

Because of these vital and legitimate interests of its members, the Chamber of Commerce respectfully submits the following brief as amicus curiae. The views expressed by the Chamber of Commerce on behalf of the business community reflect extensive experience with labor relations and collective bargaining in the private sector, and are intended to assist this Court in its resolution of the issues presented in the present case.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of the State of Wisconsin constitutes a limitation on or regulation of the rights of public school teachers to speak, assemble, and to petition their government, which rights are protected by the First Amendment to the Constitution of the United States. It is the position of the Chamber of Commerce that the Wisconsin Supreme Court's decision is an impermissible infringement on these protected rights, and the

Chamber of Commerce therefore urges that the Wisconsin Supreme Court's decision be reversed.

The Wisconsin Supreme Court has ordered the School Board in this case to prohibit its teacher employees from speaking at public meetings of the School Board on matters subject to collective bargaining between the Board and the Union representing the teachers. The Court argues that Wisconsin's Municipal Employment Relations Act, which it has found to be constitutional, provides that the Union is the exclusive bargaining representative for the teachers in the unit. Accordingly, any conversation between the Board and the teachers which can be characterized as negotiation is in derogation of the Union's exclusive representation status. In the Court's opinion a teacher who speaks at a public meeting of the School Board on matters subject to collective bargaining is negotiating with the School Board, and this speech can constitutionally be prohibited in order to prevent chaos in labor-management relations, an interest which the state has a right to protect.

It is the Chamber's position that the decisions of this Court establish that the state has no compelling interest in abridging the right of an ordinary citizen to express, at a public meeting, his views on matters in which he has a direct interest as a taxpayer, matters such as those which are being negotiated between his school board and the union representing the board's teachers. The fact that this taxpayer's views may affect the content of the bargaining package offered by the school board to the union does not pose a grave and immediate danger to interests which the state may lawfully protect. A school board which conditions its offer to a union on the views of those citizens to whom the board must answer is functioning in the best tradition of government.

The situation should be no different simply because the citizen involved happens also to be a school teacher. Teachers, as individual citizens, also have a right to speak to and petition their government. Yet, according to the

Wisconsin Supreme Court, the state, through the school board, must prohibit a teacher from attempting to do what any ordinary citizen has a right to do. The Wisconsin Court in issuing its order, makes no showing in this case of grave and immediate danger to interests which the state has a right to protect. Therefore, the Court's prohibition can only rest on the teacher's status as a public employee. However, this Court has consistently rejected the premise that the First Amendment rights of a school teacher may be abridged by the state merely because the teacher is a public employee if no compelling or overriding state interest justifying such an abridgement has been demonstrated.

The Supreme Court of Wisconsin has also erred by giving an overly broad construction to the "exclusive bargaining representative" provisions of Wisconsin's Municipal Employment Relations Act, a construction which brings those provisions into collision with the First Amendment rights of the school teachers in this case. The net effect of the Wisconsin Court's decision is that all speech between a public employer and a public employee which can be characterized as negotiation, as that term has been defined by the Wisconsin Court, is in derogation of the principle of exclusivity and can therefore be prohibited, regardless of the context in which the speech occurs. Yet the Wisconsin Supreme Court has offered no independent showing that negotiation of the type proscribed by the Court will pose grave and immediate danger to the state's interest in collective bargaining if it is permitted to take place in the context of a public meeting of the School Board. No showing of grave and immediate danger is made because none exists.

Experience in the private collective bargaining context has shown that broader limits on speech and narrower limits on exclusive representation than those struck by the Wisconsin Supreme Court can be permitted without doing grave and immediate harm to the public policy which favors collective bargaining in private employment. Accordingly, the Wisconsin Supreme Court could have,

and should have, construed more narrowly the "exclusive bargaining representative" provisions of Wisconsin's Municipal Employment Relations Act so as to avoid encroaching on the First Amendment Rights of the teachers in this case.

ARGUMENT

I.

THE DECISION OF THE SUPREME COURT OF THE STATE OF WISCONSIN CONSTITUTES AN IMPERMISSIBLE INFRINGEMENT ON THE FIRST AMENDMENT RIGHTS OF SCHOOL TEACHERS.

One Holmquist, a teacher employee of the School Board and a member of the bargaining unit represented by the Union, solicited by petition the views of his colleagues on a fair share (agency shop) agreement then being negotiated between the School Board and the Union. The majority of teachers solicited by Holmquist expressed reservations about the fair share provision. Thereafter, at its regular board meeting, during the portion of the meeting devoted to public appearances, the School Board permitted a number of individuals, including Holmquist, the opportunity to speak. Holmquist thereupon communicated to the School Board the existence and content of his petition. He did not ask the School Board to reject the fair share provision; he merely asked that the Board defer its decision pending further study of the matter. The School Board simply listened to Holmquist, making no response of any kind to the substance of his request.

Following the public meeting, the School Board decided to accept the total package demanded by the Union, except for the fair share provision, and the Union accepted the Board's offer at the next bargaining session. Subsequently, the Union filed prohibited labor practice charges with the Wisconsin Employment Relations Commission

(WERC). WERC concluded that the School Board had committed prohibited labor practices in violation of the Municipal Employment Relations Act, Sec. 111.70(3)(a)1 and 4, Stats., (MERA), that is, the Board had refused to bargain collectively with the exclusive majority representative of the teachers and the Board had interfered with, restrained, or coerced the teachers in the exercise of their right to bargain collectively through representatives of their own choosing. Accordingly, WERC issued the following order:

> [The School Board] [s]hall immediately cease and desist from permitting employees, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc.

The Wisconsin Supreme Court, in due course, affirmed WERC's decision and order.

Clearly, WERC's decision and order as affirmed by the Wisconsin Supreme Court constitute a limitation on or regulation of rights protected by the First Amendment to the Constitution of the United States. The Chamber of Commerce of the United States submits that the Wisconsin Supreme Court's decision affirming WERC's decision and order is an impermissible infringement on the First Amendment rights of those school teachers covered by the order. The Wisconsin Court has singled out a group of citizens having constitutional rights common to the general citizenry simply because that group consists of school teachers having an employment relationship with the state; the Court then imposed conditions on that employment relationship which limit the teachers' exercise of their constitutional rights. Such a result is contrary to the decisions of this Court.

The First Amendment rights which are raised in the present case are the rights of free speech, of assembly, and of petition. These rights are secured from infringement by the states through the Due Process clause of the Four-

teenth Amendment to the United States Constitution.[2] *Gitlow v. New York*, 268 U.S. 652 (1925); *United Mine Workers v. Illinois Bar Assoc.*, 389 U.S. 217 (1967).

WERC's decision and order, and hence the Wisconsin Supreme Court's decision, construe the "exclusive bargaining representative" provisions of Wisconsin's MERA. Thus, Wisconsin's MERA has been construed to have a restrictive impact on the constitutional rights of those school teachers whose employment is regulated by the Act. In testing the constitutional validity of legislative acts and, by extension, the application of those acts to specific cases, this Court indulges a presumption in favor of their validity. The presumption of constitutionality of a statute dealing with a subject clearly within the scope of the police power prevails in the absence of some factual foundation of record for declaring it to be unreasonable. *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 251 (1931). However, in cases in which the legislative act attempts to limit or otherwise infringe First Amendment rights, such as speech, assembly, and petition, this Court examines it very carefully to the point of indulging a presumption against the constitutionality of the act. *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. Irvington*, 308 U.S. 147 (1939); *United States v. C.I.O.*, 335 U.S. 106 (1948). As Justice Rutledge (joined by Justices Black, Douglas, and Murphy) stated in his concurring

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[2]The First and Fourteenth Amendments to the United States Constitution, in pertinent part, are the following:

Article I.

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article XIV.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

opinion in *United States v. C.I.O., supra,* 335 U.S. at 139-140:

> [W]hen regulations or prohibitions touch [First Amendment rights], this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the Amendment's meaning. [Footnote omitted.] That office cannot be surrendered to legislative judgment, however weighty, although such judgment is always entitled to respect.
>
> As the Court has declared repeatedly, that judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. [Footnote omitted.] The presumption rather is against the legislative intrusion into these domains. For, while not absolute, the enforced surrender of those rights must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions upon the very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly. Hence doubtful intrusions cannot be allowed to stand consistently with the Amendment's command and purpose [footnote omitted], nor therefore can the usual presumptions of constitutional validity, deriving from the weight of legislative opinion, in other matters more largely within the legislative province and special competence, obtain.

The Wisconsin Supreme Court's decision must be examined against this background.

The First Amendment right of free speech includes the freedom to express one's opinion on public questions. *New York Times Co. v. Sullivan,* 376 U.S. 254, 269 (1964). The First Amendment requires that debate on public issues be uninhibited, robust, and wide open. *Id.* at 270. The protection given free speech by the Federal Constitution was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people. *Id.* at 269. It is a prized American privilege to speak one's mind on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion. *Id.* Therefore, the First Amendment secures the widest possible dissemination of information from diverse and antagonistic sources. *Id.* at 266.

> [A]bove all else, the First Amendment means the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." [Citation omitted.] *Police Department v. Mosley,* 408 U.S. 92, 95-96 (1972).

The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. *United Mine Workers v. Illinois Bar Assoc.,* 389 U.S. 217, 222 (1967). Maintaining opportunities for free political discussion so that government may be responsive to the will of the people and so that changes may be obtained by lawful means is essential to the security of the country and is a fundamental principle of our constitutional system. *Edwards v. South Carolina,* 372 U.S. 229, 238 (1963). Every person or group engaged in trying to persuade governmental action is exercising the First Amendment right of petition. *Liberty Lobby, Inc. v. Pearson,* 390 F.2d 489 (D.C. Cir. 1968, Burger, J.). The right to petition extends to all departments of the government. *California Transport v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). The grievances for the redress of which the rights of petition and assembly are insured under

the First Amendment are not solely religious or political ones, but include economic grievances as well. *Thomas v. Collins, supra,* 323 U.S. at 531 (1945). The right to discuss and inform people concerning the advantages and disadvantages of labor unions and of joining them is protected, not only as a part of free speech, but as a part of free assembly. *Id.* at 532. The right to assemble peaceably and the right to petition are intimately connected, in origin and in purpose, with the other First Amendment rights of free speech and free press. Though not identical, they are all inseparable. *United Mine Workers, supra,* 389 U.S. at 222.

Although this Court has held that the rights guaranteed by the First Amendment are not absolute, the standard which the Court has often announced and applied in cases involving the abridgement of speech is a stringent one. There must be a clear, present, and imminent danger that the speech in question will bring about the substantive evils which the legislature has a right to prevent or that the speech in question poses a clear, present, and imminent danger to interests which the state may lawfully protect. *Schenck v. United States,* 249 U.S. 47 (1919); *Board of Education v. Barnette,* 319 U.S. 624 (1943); *Dennis v. United States,* 341 U.S. 494 (1951); *Brandenburg v. Ohio,* 395 U.S. 444 (1969). Any system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity, and a party who seeks to have such a restraint upheld thus carries a heavy burden of showing justification for the imposition of such a restraint. *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971).

The authority of government to limit or regulate the exercise of the rights of assembly and petition is similarly restricted. Government may not flatly deny the right of the people peaceably to assemble to petition the government for a redress of grievances. *United States v. Crawthers,* 456 F.2d 1074 (4th Cir. 1972). Nor can the government do indirectly what it cannot do directly:

> The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition or assembly as such. *United Mine Workers, supra,* 389 U.S. at 222.

Accordingly, government may not do such things as permit public meetings in support of government policy and at the same time forbid public meetings that are opposed to that policy. *Crawthers, supra,* 456 F.2d at 1079. Moreover, courts are expected to construe statutes narrowly so as to avoid constitutional questions, such as questions concerning First Amendment rights. *Schneider v. Smith,* 390 U.S. 17, 26 (1968). Laws which actually affect the exercise of these rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. *United Mine Workers, supra,* 389 U.S. at 222. Nothing less than an overriding and compelling government interest or a showing of grave and immediate danger to interests which the government may lawfully protect is sufficient to justify governmental intrusion into First Amendment rights. *See, Gibson v. Legislative Investigating Committee,* 372 U.S. 539 (1963); *Board of Education v. Barnette, supra.* As this Court stated in *Thomas v. Collins, supra,* 323 U.S. at 530:

> [A] preferred place [is] given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. [Citations omitted.] That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. [Citations omitted.]
>
> For these reasons any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present dangers. [Footnote omitted.] The rational connection between the remedy provided and the evil to be curbed, which in other contexts might

> support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, *must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.* It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. [Emphasis supplied.]

That these standards are imposed on the states through the Due Process clause of the Fourteenth Amendment makes them no less stringent. As this Court stated in *Barnette, supra,* 319 U.S. at 639:

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

The Wisconsin Court acknowledged, indeed cited, the pertinent authority of this Court governing the abridgement of First Amendment rights. Nevertheless, by affirming WERC's decision and order, the Wisconsin Court did all of the following: 1) prohibited the School Board's teacher employees from speaking freely on matters of public interest; 2) imposed prior restraints on the speech of these teachers; 3) restricted their right peaceably to assemble; and 4) restricted their right to petition the School Board. The Wisconsin Court's decision can be sustained by nothing less than a showing that a clear public interest was threatened, not doubtfully or remotely, but by a clear and present public danger, actual or intended. The Chamber of Connerce submits that the Wisconsin Court has set forth no such showing. The Wisconsin Court's justification for the constitutionality of the "exclusive bargaining representative" provisions in Wisconsin's MERA is inadequate to support the broad restrictions in the present case. Moreover, the constitutionality of the "exclusive bargaining representative" provisions in Wisconsin's MERA are not at issue in this case. What is at issue is the constitutionality of the Wisconsin Court's application of those provisions. In order to prevent relative chaos in labor-management relations, the Wisconsin Court might constitutionally be permitted to prohibit a public employer from sitting down in his office with a handful of employees and hammering out a contract with them in derogation of the union's representation status. But can the Wisconsin Court, on such a slender premise, constitutionally be permitted to prohibit a public employee from exercising at a public meeting his rights of speech, assembly, and petition? We think not. In fact, the State has no compelling interest in such a pervasive abridgment of First Amendment rights.

One can easily imagine the following hypothetical situation. A tax-paying citizen of the school district has children enrolled in the district's schools. He is deeply concerned that teachers in the district may be required to pay their so-called "fair share" to a union or risk losing their jobs.

The tax-paying citizen has neither joined this union nor elected it to public office. It may be that this particular citizen happens to believe the admonition that one's heart is where one puts his money. It may be that he happens to believe that teachers, as public servants, owe their allegiance to the public they serve. It may even be that he happens to believe that no American worker, least of all a public employee, should be required to pay tribute to a private organization in order to work in his chosen field. Whatever his beliefs, this citizen is entitled to them. Moreover, he has the right peaceably to convert others to his beliefs and the right to take lawful action to petition and to persuade his elected representatives to adopt and to implement his beliefs.

In exercising these rights he decides to solicit teachers in the district and ascertain their views on the fair share agreement. He discovers that a majority of the teachers he solicits have reservations about the fair share agreement. He requests and is permitted the opportunity to speak at a public school board meeting during the portion of the meeting devoted to public appearances. He communicates to the school board the results of his survey and asks, not that the board defer its decision pending further study, but that the board reject the fair share proposal in its entirety. If the board were persuaded by the arguments of this citizen, one of the board's constituents, and if, subsequently, the board refused to agree to a fair share provision in its contract with the union, would the board have violated its duty to bargain in good faith? Would the board have interfered with, restrained, or coerced its teachers in the exercise of their right to bargain collectively through representatives of their own choosing? We submit that it would not. Yet such a citizen could achieve the same result as Holmquist achieved in the present case. Moreover, the reasoning used by the Wisconsin Supreme Court to reach its decision in the present case could be used equally to prohibit the board from entertaining the views of a citizen on matters being negotiated between the board and the union. Nevertheless, the Court could not properly enforce such a prohibition.

No compelling state interest could override the right of a citizen to express, at a public meeting, his views on matters in which he has a direct interest as a taxpayer, matters such as those which are being negotiated between his school board and the union representing his children's teachers. The fact that this taxpayer's views may affect the content of the bargaining package offered by the school board to the union does not pose a grave and immediate danger to interests which the state may lawfully protect. A school board which conditions its offer to a union on the views of those citizens to whom the board must answer is functioning in the best tradition of government. As this Court stated in *Barnette, supra,* 319 U.S. at 641:

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

In such a context any effort by the state to eliminate the board's access to the views of its constituents or to prohibit citizens from having access to their school board would be impermissible.

The situation should be no different simply because the citizens involved happen also to be school teachers. The state, through the school board, cannot prohibit a member of the general public from attempting to affect the outcome of collective bargaining by speaking at a public meeting on the subjects being negotiated. Yet according to the Wisconsin Supreme Court the state, through the school board, must prohibit a teacher from attempting to do the same thing. Such a distinction can only rest on the teacher's status as a public employee. However, this Court has consistently rejected the premise that the First Amendment rights of a school teacher may be abridged by the state merely because the teacher is a public employee if no compelling or overriding state

interest justifying such an abridgement has been demonstrated.

This Court has looked cautiously at attempts to abridge the First Amendment rights of public school teachers. In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court reaffirmed its belief that constitutional rights must especially be protected in the nation's schools. The Court stated:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. "By limiting the power of the States to interfere with the freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguard of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." [Citation omitted.] *Id.* at 487.

Thus, the Court has unequivocally rejected the premise that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See, e.g. Wiemann v. Updegraff*, 344 U.S. 183 (1952); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker, supra.*

Having failed to set forth any constitutionally acceptable justification for its decision, the Wisconsin Supreme Court cannot sustain its broad infringement on the First Amendment rights of the school teachers in this case. Accordingly,

those teachers employed by the Madison School Board who desire to address the Board at a public meeting should be regarded as the members of the general public they seek to be, even though they happen to address the Board on matters subject to collective bargaining between the School Board and the Union. *See, Pickering, supra.*

II.

A SCHOOL BOARD EMPLOYER WHICH, AT A PUBLIC MEETING, MERELY LISTENS WHILE A SCHOOL TEACHER EMPLOYEE BRINGS TO THE BOARD'S ATTENTION UNSOLICITED FACTS PERTAINING TO THE EMPLOYMENT RELATIONSHIP DOES NOT THEREBY BARGAIN WITH THAT EMPLOYEE.

By holding that the School Board negotiated with Holmquist when it merely listened to him while he brought to the Board's attention unsolicited information pertaining to the fair share agreement, the Wisconsin Supreme Court has given an unnecessarily broad definition to the term "negotiate." The Court then carried its concept of negotiation far outside the traditional collective bargaining context and imposed it on a meeting of the School Board which the general public was invited to attend and at which they were invited to express their views. Although the Board's teacher employees, as citizens, would otherwise have had the right to speak and to petition the Board on any matter they chose, the teachers were prohibited from speaking to the Board on matters pertaining to wages, hours, and working conditions because the Wisconsin Court had characterized this meeting as a part of the collective bargaining process.

In reaching its decision the Wisconsin Court reasoned that the principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts and the First Amendment rights of those persons are, to that extent, thereby infringed. The collective bargaining process of necessity subordinates the interests

of an individual employee to the collective interests of all employees in a bargaining unit. The Wisconsin Court apparently assumed that permitting negotiations outside the majority bargaining unit would produce relative chaos in labor-management relations. On the premise that the necessity to avoid the dangers attendant upon relative chaos in labor-management relations outweighs the infringement on speech, the Wisconsin Court concluded that speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to representatives of the majority bargaining unit.

As justification for the constitutionality of the "exclusive bargaining representative" provisions in Wisconsin's MERA, the Wisconsin Court's reasoning may or may not be sufficient. The constitutionality of those provisions *per se* is not at issue in the present case.[3] The Wisconsin Court apparently conceived that it had met its duty by reaffirming its belief that the "exclusive bargaining representative" provisions are themselves constitutional. The Wisconsin Court apparently believed that no further constitutional questions remained. However, the constitutional implications of the present case are two-fold. The premise that negotiating in the traditional collective bargaining context can constitutionally be restricted to the exclusive representative does not support, in law or in logic, the conclusion that any context in which a public employer and his employees may happen to discuss wages, hours, and working conditions can constitutionally be defined as a collective bargaining context.

The context in which negotiation occurs apparently did not pose a constitutional question to the Wisconsin Court. According to the Wisconsin Court it is only necessary to determine whether conversations in a given case can be described as negotiation; if they can be so described then they can be restricted to the exclusive bargaining representative. The Wisconsin Court therefore concluded that the attendant infringement on speech is constitutionally permissible because it is constitutionally permissible to restrict negotiations to the exclusive representative. The net effect of the Wisconsin Court's decision is that all speech between a public employer and a public employee which can be characterized as negotiation, regardless of the context in which the speech occurs, is in derogation of the principle of exclusivity and can therefore be prohibited.

[3]The Chamber of Commerce submits that the Wisconsin Court's reasoning is more akin to the "rational basis" test than it is to the "clear, present, and immediate danger" test. If this is, in fact, the case, then the Wisconsin Court has failed even to justify the constitutionality of the "exclusive bargaining representative" provisions themselves since those provisions clearly limit the exercise of First Amendment rights.

The Wisconsin Court's definition of negotiation and the Court's application of that definition to the public meeting of the School Board has the direct effect of abridging the First Amendment rights of the Board's teachers. In order to support such a result, there must be an independent showing that negotiation of the type proscribed by the Wisconsin Supreme Court will pose grave and immediate danger to the state's interest in collective bargaining if it is permitted to take place in the context of a public meeting of the School Board. Yet experience in the private sector collective bargaining context has shown that a narrower definition of negotiation can be tolerated and a more restricted view of collective bargaining can be taken without injuring the public's interest in collective bargaining in the private sector.

The National Labor Relations Act, 29 U.S.C. §151 *et seq.* (NLRA), which regulates, in part, the bargaining relationship between unions and employers in private industry, contains exclusive representation provisions which are similar to those found in Wisconsin's MERA. In addition, the NLRA, like Wisconsin's MERA, describes certain conduct which, if engaged in by an employer, constitutes a violation of these exclusive representation provisions, and the NLRA, like Wisconsin's MERA, authorizes certain sanctions for engaging in unlawful conduct. The conduct described and the sanctions

authorized by the NLRA are similar to the conduct described and the sanctions authorized by Wisconsin's MERA. However, in the public employment context, the particular context regulated by Wisconsin's MERA, employees have a constitutional right to speak to their employer (the government) and the constitutional right peaceably to assemble and to petition their employer (the government), and these constitutional rights can be limited or regulated only in grave circumstances or for compelling reasons. In the private employment context, the particular context regulated by the NLRA, employees do not have a constitutional right to speak to their employer, nor a constitutional right peaceably to assemble and to petition their employer. Whatever rights employees in the private sector may have to treat with their employer are conferred by statute.

One might therefore expect to find a stricter regulation of speech in the private collective bargaining context than in the public collective bargaining context. In any event, one would certainly *not* expect to find a more stringent regulation of speech in the public collective bargaining context. The National Labor Relations Board, which is initially responsible for applying its expertise to the interpretations of the NLRA, could define the term negotiate so as to prohibit an employer from entertaining the unsolicited views of his employees on matters being negotiated between the employer and the union representing his employees. Justification for such a definition might be found in the fact that employees in the private sector have only a statutory right to approach their employer on the matters of wages, hours, and working conditions, and the statute conferring that right contemplates that it will be exercised only through the employees' designated representative. Yet, not even the National Labor Relations Board has gone as far in restricting an employee's access to his employer as has the Wisconsin Employment Relations Commission.

In *Outboard Marine Corp.*, 143 NLRB No. 57 (1963), the employer and the union were negotiating over a wage

reopener in the collective bargaining agreement in effect between them. The parties reached agreement on the proposed wage package, but the employer refused to agree to a check-off clause requested by the union. The union representatives agreed to submit the package to the union membership for ratification, but without recommendation, since the union representatives had conditioned their recommendation on receiving the check-off clause to which the employer had refused to agree. The membership rejected the wage package and the union representatives notified the employer to this effect, asking that the wage increases not be implemented.

Thereafter, a group of employees in the unit circulated among their fellow workers a petition to their employer which expressed their desire to accept the employer's wage package. Management officials had heard rumors that the petition was being circulated. In fact, the local union president had told the director of industrial relations about the petition. In due course, the employees presented their petition to their employer and the employer received it. The employer then posted a notice stating that he had received the employees' petition which expressed their desire to accept the wage increase and stating the employer's opinion that the union was not acting in the best interests of the employees when it failed to ratify the agreement. Thereafter the employer notified the union of his intention to put the wage increase into effect on a stated date, but added that his actions should not be interpreted as restricting any further negotiations. The employer then posted another notice to his employees in which he announced the wage increase.

On charges filed by the union that the employer had engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the NLRA, the Board held that the employer had not refused to bargain with the union and had not interfered with, restrained, or coerced his employees in the exercise of their right to bargain collectively through their exclusive representative. The Board found that the employer, simply by receiving the petition from his employees and posting a notice to that effect, had

neither expressed nor implied any desire to deal directly with his employees. In fact, when the employer had decided on his course of action with respect to the wage increase, he did not thereafter deal directly with the employees who had submitted the petition. Instead, the employer dealt with the union by giving them formal notice of his proposal to put the wage increase into effect, but inviting them to continue their negotiations with him.

Other National Labor Relations Board decisions, though not as directly on point as *Outboard Marine*, have nonetheless recognized the very practical fact that individuals feel the need to speak to their employees outside the formal boundaries of the bargaining unit and employers feel the need to have personal contact with their employees without using the sometimes impersonal conduit of the exclusive representative. Accordingly, in its decisions, the Board has allowed some latitude for this kind of exchange, even though the subjects discussed may be matters which the employer and the union are negotiating.

In *American Printing Company*, 173 NLRB No. 17 (1968), a group of pressmen sent their employer a letter advising him that they would not work on the following day unless the pressmen and the employer could come to an agreement which was better than the one which had been negotiated between the employer and the union. The employer went to the pressroom without a union representative being present and met with the pressmen. The employer told the pressmen that he could not meet their demands, and he told them to be reasonable. The employer then tried to draw them out in conversation to determine what they would be willing to accept in order to remain on the job. However, the employer made no specific proposals. The Board found that the employer neither attempted to induce employees in the union's certified unit to bargain with him directly nor engaged in direct bargaining with the employees. The Board therefore concluded that the employer had not violated Section 8(a)(5) of the NLRA by refusing to bargain with the union.

In *PPG Industries, Inc.*, 172 NLRB No. 61 (1968), the employer sent a letter to his employees and their wives in which he outlined his proposals for modification of the existing contract. One of the proposals he stated in the letter was a wage increase. The employer also expressed in his letter his regret that the union membership had rejected his proposals, and he assured his employees that he was ready to discuss problems with them at any time. The Board found that the employer's letter was not an attempt to denigrate the union or to undermine its authority. The Board therefore concluded that the employer had not interfered with, restrained, or coerced his employees in the exercise of their right to bargain collectively through their exclusive representative.

In *Tobasco Prestressed Concrete Co.*, 177 NLRB No. 101 (1969), two employees told their employer that they were curious about the employer's proposed health and welfare plan, which had been a stumbling block in contract negotiations with the union. The employer invited the two employees to meet with the representative of the insurance company which was to provide the plan. The employees were shown the proposed plan. The employer gave one of the employees a copy of the plan and asked him his opinion of the plan. The Board found that the employer had merely discussed the plan with the two employees, and the Board concluded that this did not constitute bargaining in derogation of the union which represented the employees.

In *Stokely-Van Camp, Inc.*, 186 NLRB No. 64 (1970), the employer, during contract negotiations, conducted three employee meetings for the purpose of explaining contract proposals which had been rejected by the union membership. No employees were required to attend the meetings. At the start of each meeting the employer made it clear that the meeting was not a negotiating meeting but was called in order to clarify any misunderstanding and to answer any questions the employees might have concerning the proposals. Questions were in fact raised and were answered. However, there was no attempt to

bargain with the employees, no promises were made to the employees, and no questions were asked about their contract desires. The union contended that the employer had attempted to undermine and bypass the union as the bargaining agent by persuading employees to exert pressure on the union to accept the employer's contract proposals. The Board rejected the union's argument and concluded that the employer had not violated the NLRA by refusing to bargain with the union.

The Chamber of Commerce is aware, of course, that decisions of the National Labor Relations Board are not binding on this Court, and they are not determinative in this case; nor are the Board's decisions offered as precedent. Nevertheless, these decisions are instructive because they demonstrate a delicate understanding of human needs and human behavior in a particular collective bargaining context where no such understanding is constitutionally mandated. Moreover, they establish beyond question that broader limits on speech and narrower limits on exclusive representation than those struck by the Wisconsin Supreme Court can be permitted without doing grave and immediate harm to the public policy which favors collective bargaining in private employment. To put it more precisely, the term "negotiate" can be defined more narrowly than the Wisconsin Supreme Court has defined it and the collective bargaining context can be more limited than the Wisconsin Supreme Court has found it to be without bringing down about our ears the whole framework of collective bargaining.

This is also precisely where the Wisconsin Supreme Court has erred, and erred grievously. The Wisconsin Court has ignored this Court's well-reasoned admonition that, where possible, statutes should be construed narrowly so as to avoid collisions with First Amendment rights. *Schneider v. Smith,* 390 U.S. 17 (1968). Instead of construing more narrowly the statutory right of the union in this case to be the exclusive representative of the teachers in the unit, the Wisconsin Court broadly infringed the First Amendment rights of the teachers to speak, assemble,

and petition. Had the Wisconsin Court heeded this Court's admonition and had it sought the expertise of others, such as the National Labor Relations Board, who have had to make similar decisions, it might have avoided its harsh and unsupportable result.

CONCLUSION

For the reasons set forth above, and those in the Appellants brief, it is respectfully requested that the judgment of the Supreme Court of the State of Wisconsin be reversed.

Respectfully submitted,

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